KNIGHT CAPITAL SDN BHD v. RUN EDUCATION SDN BHD; PLUSH DOLLAR (M) SDN BHD (APPLICANT)

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS JC
[COMPANIES (WINDING UP) NO: 28NCC-1075-12-2013]
25 MAY 2016

COMPANY LAW: *Winding up – Stay of order – Application by majority shareholder – Whether applicant had locus – Whether respondent likely to be commercially solvent – Whether would be able to pay debt when debt become due and payable in future – Whether payment of creditors' debts meant that wound up company was solvent – Whether application for stay was against public interest and detrimental to commercial morality – Companies Act 1965, ss. 4(1), 243(1)*

The petitioner filed a winding up petition to wind up the respondent on 3 December 2013, which was grounded on a consent judgment entered between the petitioner and the respondent and two other defendants pursuant to a High Court civil suit. Following the respondent's failure to comply with the consent judgment, a winding up order was made against the respondent and the official receiver ('OR') was appointed as the provisional liquidator for the respondent. Subsequently, on 22 October 2015, the applicant filed a notice of motion to move the court under s. 243(1) of the Companies Act 1965 ('the Companies Act') for all proceedings as regards the winding up order against the respondent, the appointment of the provisional liquidator and all other ancillary or subsequent proceedings thereto or pursuant thereto be stayed altogether with immediate effect ('second stay application'). There were two other previous stay applications under s. 243(1) of the Companies Act, the first, by the respondent which had been struck off and the second, by a contributory of the respondent ('the first stay application') which was also dismissed. The grounds relied on by the applicant to justify the second stay application were, *inter alia*: (i) the respondent had a valid licence to conduct a nursing course since 2011 and it was imperative for the respondent to be back in operation so that the students could complete their courses; (ii) judgment sum owing to the petitioner had been fully settled and the petitioner had confirmed that the respondent's liability under the consent judgment was fully settled and had no objection for any application for stay by the respondent; (iii) the grounds on which the first stay application was dismissed no longer existed; and (iv) the respondent had not filed any statement of account with the Companies Commission of Malaysia ('CCM') since its inception, thus contravened s. 169 of the Companies Act. Therefore, the applicant contended that the second stay application would not in any way prejudice any parties or persons and was not detrimental to the commercial morality and the interest of public.

Held (dismissing second stay application with no order as to costs):

(1) The applicant, being the majority shareholder of the respondent, had the *locus* to move the court for an order to stay the winding up order based on the definition of 'contributory' under s. 4(1) of the Companies Act. The applicant's averment that the respondent held a valid license to conduct a nursing course since 2011 was not supported by evidence. In fact, no such license issued by the relevant authority to the respondent was adduced before the court. Considering the status of the respondent as a wound up entity, it was doubtful that the respondent possessed a valid license as alleged. Hence, the averments were merely assertions without any proof. (paras 25, 26 & 28)

(2) The applicant did not have the knowledge in respect of the students, the operating license that the respondent was said to have held, the frozen account of the respondent and the disbursement of the PTPTN loan. The applicant did not file any affidavit to reply to another contributory of the respondent, Syarikat Pesaka Antah Sdn Bhd's affidavit opposing the second stay application. Based on the record, the applicant in the first stay application had exhibited the same list of names and number of students said to be undergoing the nursing course. There was no explanation as to what had happened to the said students after the respondent was wound up on 30 April 2014. Since the respondent had been wound up, it was unlikely that the students were still undergoing training at the institution operated and managed by the respondent. (paras 29 & 30)

(3) Under the law, once a company is wound up, the Board of Directors is effectively *functus officio*. The OR, in its report, did not provide any information regarding the operational status of the respondent after the winding up order and the fate of the students. What was imperative for the court was whether the respondent was in the position to be back in the business of providing nursing courses. The affidavit supporting the second stay application did not offer any evidence to demonstrate the respondent was likely to be commercially solvent and able to pay its debt when the debt became due and payable in the future. The applicant who was the majority shareholder and contributory of the respondent did not indicate that shareholders of any other interested party would inject funds into the respondent. (paras 31, 32, 33 & 35)

(4) Though the debt owed to the petitioner had been paid and the petitioner supported the application for stay, it did not overcome the legal threshold imposed on the applicant under s. 243(1) of the Companies Act. Payment of creditors' debts does not necessarily mean the wound up company was solvent. The OR's support for the stay application was also not a deciding factor here, as the support was solely due to the debt owed to the petitioner which had been paid, despite the fact that the fees and expenses incurred by the OR had not been paid. (para 36)

(5) The OR's report, which was required under s. 243 of the Companies Act was very much lacking in terms of providing information with respect to the facts or matters which was relevant to a stay application under s. 243(1) of the Companies Act. There was no evidence adduced in respect of the current financial status of the respondent and the business plan to revive the respondent company. There was no investigation conducted into the affairs of the company to enable the OR to conclude the company was solvent to be back in business or otherwise. (paras 39 & 40)

(6) The applicant had exhibited the respondent's financial statement for the year ended 31 December 2013 and 31 December 2012, which was a true and fair view of the financial position of the respondent for the two years before it was wound up. However, there was no evidence to show that the said financial statements were lodged with the Companies Commission of Malaysia. The financial statements for the year 2012 and 2013 did not provide adequate evidence to demonstrate that the respondent was likely to be a commercially solvent entity if the second stay application was granted for purpose of resuming the conduct of its business and affairs. The failure of the applicant to adduce the financial statement for the year 2014 compounded with the deficit in the shareholders' fund and the decreasing cash flow for the year 2012 and 2013 raised a real and serious doubt as to the likelihood of the respondent to be commercially solvent. (paras 41, 42, 43 & 47)

(7) Paramount consideration ought to be given to public interest and commercial morality compared to that of the creditors and contributories of the respondent. The facts clearly pointed to one conclusion, that it would be contrary to public interest and detrimental to commercial morality to accede to the applicant's application to stay the winding up order and allow the respondent to resume the conduct of its business and affairs, in particular to manage and operate a university. (paras 49 & 50)

Case(s) referred to:

Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd [2015] 9 CLJ 640 HC ***(refd)***

Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor [1995] 3 CLJ 136 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 169, 218, 233(1), 243(1), (2)

For the applicant - MR Kumar (mentioning on behalf of the petitioner); M/s Kumar Assocs
For the company's contributory - Deborah J Kaur; M/s Rajes Hisham Rahim & Gopal
For the official receiver - Subri Hashim; Department of Insolvency

Reported by S Barathi

A

JUDGMENT

Khadijah Idris JC:

Introduction

B **[1]** On 3 December 2013 Knight Capital Sdn Bhd ("petitioner"), filed a winding up petition seeking for a court order to wind up Run Education Sdn Bhd ("respondent"). The petition was grounded on a consent judgment dated 17 October 2012 entered between petitioner and three defendants, the third defendant being the respondent ("consent judgment") pursuant to a High Court Civil Suit (22NCC-934-00/2012) filed by the petitioner against the C three defendants. Based on the consent judgment the defendants are obliged to pay a sum of RM586,548.10 in the manner mutually agreed by all the parties as specifically recorded in the consent judgment.

[2] The respondent failed to comply with the consent judgment, thus the winding up proceeding. On 30 April 2014 a winding up order was made D against respondent and the official receiver was appointed as provisional liquidator for respondent ("winding up order").

[3] On 22 October 2015 Plush Dollar (M) Sdn Bhd ("applicant") filed a notice of motion (encl. 34) to move the court under s. 243(1) of the Companies Act 1965 (Companies Act) for all proceedings as regards the E winding up order against the respondent, the appointment of the provisional liquidator and all other ancillary or subsequent proceedings thereto or pursuant thereto be stayed altogether with immediate effect.

[4] Based on record, two stay applications were previously filed under F s. 243(1) of the Companies Act. The first application, encl. 17, was made by the respondent itself. The affidavit in support of that application was affirmed by its director Manimaran a/l Kanappram. On the hearing day respondent withdrew the application and the court struck off the application accordingly. The second application, encl. 21, was made by a contributory of the respondent. The application was also dismissed by the court. No appeal was G filed against the dismissal. For ease of reference encl. 21 will be referred to as the "first stay application" and the instant stay application encl. 34 will be referred to as the "second stay application".

[5] On 2 March 2016 the court dismissed the second stay application with H no order as to costs. The applicant appealed.

Second Stay Application

[6] Applicant's affidavit in support of the second stay application (encl. 35) was affirmed by its director Manimaran a/l Kanappram who averred that the applicant is the substantial contributory of the respondent by I virtue of it holding approximately 80.7% of the total issued shares of the respondent. The remaining 19.3% of the shares are held by the following company and individuals, namely:

Name the company/individuals	No. of Shares
1. Syarikat Pesaka Antah Sdn Bhd	2,900,000
2. Yussaini Bin Othman	1
3. Summugam a/l S Ramasamy	1

According to applicant the above contributories support the said stay application.

[7] The grounds put forward by applicant to justify the second stay application are as follows:

(a) the respondent has a valid license to conduct a nursing course under the name of I-UCAS since 2011. There are currently 602 students studying at I-UCAS and that the students have taken study loan from the National Higher Education Fund Corporation ("PTPTN"). Due to the winding up order, the respondent's account has been frozen and the students' loan has not been disbursed by PTPTN and this has caused great inconvenience to respondent and the students. Therefore it is imperative for the respondent to be back in operation so the 602 students can complete their respective courses at I-UCAS. Applicant exhibited a copy of the student attendance list as exh. "MK-7" encl. 35;

(b) judgment sum owing to the petitioner was fully settled by one of the debtors of the respondent. By a letter dated 26 February 2015 addressed to the respondent (exh. "MK-3" encl. 35) the petitioner confirmed that the respondent's liability under the consent judgment was fully settled and therefore petitioner has no objection for any application by respondent to stay the winding up order;

(c) respondent was involved in another suit, where FP Management Consultants Sdn Bhd had sued respondent and two other. However the suit was settled by a consent order dated 11 June 2015 (exh. "MK-4" encl. 35), where the other two defendants agreed to pay the compromised sum;

(d) the action filed by Syarikat Pesaka Antah Sdn Bhd ("SPA") against respondent in respect of an advance of RM850,000 made by SPA to respondent will be settled as the applicant had made a proposal to SPA to settle the outstanding sum due to SPA upon the stay application being granted by the court. According to the applicant, the proposal will be accepted by SPA;

(e) the grounds on which the first stay application was dismissed no longer exist. The said grounds are as follows:

(i) that the first stay application should be filed by the liquidator, creditor or contributory of the respondent pursuant to s. 243(1) of the Companies Act and not by Winfield Academy Sdn Bhd.

A Winfield Academy Sdn Bhd only bought 100,000 shares from the applicant who is the major shareholder in respondent. Thus, the contributory should be applicant;

(ii) that on 9 October 2014, FP Management Consultant Sdn Bhd had obtained leave from the High Court to file an injunction application against respondent, applicant and Winfield Academy Sdn Bhd. The purport of the leave application is to restrain applicant from transferring its shares. In light of this application, the court was concerned as to how the shares were transferred by applicant to Winfield Academy Sdn Bhd in November 2014;

C (iii) that respondent has not filed any statement of account with the Companies Commission of Malaysia since its inception, thus in contravention of s. 169 of the Companies Act. To comply with the statutory requirement applicant has caused a set of the respondent's accounts be forwarded to the official receiver (exh. "MK-6" encl. 35); and

(iv) that there is a delay of one year five months in filing the first stay application as the winding up order was granted on 30 April 2014. The applicant explained delay was because only on 11 June 2015 a compromise was reached between respondent and FP Management (exh. "MK-4" encl. 35).

[8] Premised on the above applicant believes the second stay application will not in any way prejudice any parties or persons and is not detrimental to commercial morality and the interest of the public. Therefore the F respondent should be allowed to conduct and resume the conduct of its business and affairs.

[9] Contrary to what was averred by applicant, SPA through its Deputy General Manager averred the applicant's statement that SPA supports the second stay application is the applicant's own contention. This is because G SPA had never indicated that they consented to the said application and neither has the applicant enquired as to whether SPA consents prior to the said application.

[10] SPA also averred the following:

H (a) the applicant contended the consent of the petitioner to the second stay application cannot be conclusive as there are other debtors of the respondent;

(b) after having obtained leave from the court on 20 August 2015, SPA filed a civil suit in the High Court 22NCVC-514-09/2015 against respondent, I applicant and one Summugam a/l S Ramasamy director of respondent. SPA's contention is that the applicant had admitted to the debt due and owing to SPA as evident by applicant's letter dated 24 May 2010

(exh. "AZ-7" encl. 36). The applicant and Summugam a/l S Ramasamy had filed their statement of defence. Though the applicant had made a proposal to SPA, SPA has not accepted the same as the terms of payment are unreasonable and not conclusive;

(c) SPA had served, on 2 October 2015, a copy of the writ and statement of claim on the official receiver who has acknowledged receipt of the same as evident by official receiver's acknowledgment receipt (exh. "AZ-4" encl. 36). However no defence was filed by respondent in the Civil Suit 22NCVC-514-09/2015 and judgment in default of defence was entered against respondent on 7 December 2015 for, among others, the amount of RM850,000 and RM299,526. SPA has submitted three copies of the draft judgment in default of defence to the official receiver for approval (exh. "AZ-10" encl. 36);

(d) respondent has not filed its audited accounts as evident from the search conducted at the Companies Commission of Malaysia on 23 December 2013 (exh. "AZ-8" encl. 36 and exh. "MK-2" encl. 35). SPA also averred the financial statements of the respondent as exhibited (exh. "MK-6" encl. 35) does not reflect the actual situation of the respondent;

(e) according to SPA, applicant does not have knowledge of the averments that it had made in respect of the following:

(i) 602 students currently studying at I-UCAS obtained loan from PTPTN;

(ii) respondent has a valid licence to operate a nursing course at I-UCAS since 2011;

(iii) respondent's account frozen due to the winding up order and the student loan has not been disbursed by PTPTN to the respondent's account;

(f) the report by official receiver that there is only one unsecured creditor with a debt of RM596,935.20 as stated in the statement of affairs filed by the director of respondent is not true because the said director at all time had complete knowledge of the respondent's debt to SPA;

(g) official receiver had knowledge of the claim by Management Consultants Sdn Bhd but this was not stated in the official receiver's report.

[11] Based on the premise, SPA prayed for second stay application be dismissed with costs as the applicant has not proven to the court the principles of law applicable for a stay of the winding up order. SPA stated the applicant has not disclosed the actual status and condition of the respondent and has not given an accurate picture of the status of the respondent.

[12] However on 5 February 2016, at the hearing of the second stay application, learned counsel for SPA informed the court SPA is not objecting to the said application as SPA has agreed to resolve the matter with the applicant.

[13] The official receiver had filed a report dated 4 November 2015. The official receiver reported that Manimaran a/l Kanappram, a director of respondent had filed the respondent's statement of affairs on 10 April 2015. Respondent has one unsecured creditor, namely the petitioner with a debt of RM596,935.20. As at the date of the report the official receiver had only received one proof of debt filed by the petitioner for RM517,541.02. The respondent did not make any payment to settle the debt filed by petitioner and that administrative and the official receiver fees have not been paid. Credit balance of respondent estate is RM2,959.90. According to official receiver, based on encl. 34 the petitioner's debt was settled by the principal debtor namely Summugam a/l S Ramasamy and Sharmita a/p Summugam. The official receiver has no objection to the second stay application because the petitioner's debt has been settled by the principal debtors. The official receiver sought for the administrative costs incurred by the official receiver to be paid by respondent.

Law

[14] Section 243 of the Companies Act provides as follows:

> 243. Power to stay winding up
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> (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.
>
> (2) On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.
>
> (3) An office copy of every order made under this section shall be lodged by the company with the Registrar and with the Official Receiver within fourteen days after the making of the order.
>
> Penalty: One thousand ringgit. Default penalty.

[15] Based on s. 243(1) of the Companies Act the court has a discretion to stay proceedings after a winding up order has been made on the application of either the liquidator or official receiver, any creditor or contributory of the wound up company. Section 243(1) of the Companies Act requires the applicant to prove to the satisfaction of the court that a stay ought to be granted.

[16] The principles governing a stay under s. 243(1) of the Companies Act was analytically discussed by the Federal Court in *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709. The Federal Court in its judgment referred and followed the principles established in several English cases which dealt with similar application. At p. 501 (CLJ); p. 718 (MLJ) the Federal Court has this to say:

> In summary, the principles which emerge from the above authorities are these:
>
> (1) The granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
>
> (2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.
>
> (3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
>
> (4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.
>
> It must, however, be remembered that the above considerations are not meant to be exhaustive, but they have been summarised to indicate that they had not been considered or discussed in the written judgment of the learned judge.

[17] In *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* [1995] 3 CLJ 136; [1995] 2 MLJ 700, the respondent company was wound up on the petitioner's petition which was grounded on a statutory notice under s. 218 of the Companies Act. The respondent company had neglected and failed to pay the sum RM36,057.21 demanded under the said statutory notice four months after the winding up order was made the applicant who is one of the directors and a contributory of the respondent company filed an application for an order that all further proceedings in the winding up of the company be stayed absolutely or alternatively be stayed on such terms and conditions as the court thinks fit.

[18] In *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* (*supra*) one of the grounds forwarded by the applicant to justify the stay was that the respondent company had paid to the official receiver who is the provisional liquidator the sum of RM36,057.21 and RM36,059.28 being the sum due to the petitioner and another creditor respectively. In its report the official receiver stated the applicant is a director and contributory of the respondent company had made payment to the official receiver to settle the respondent company's liability to the petitioner and another creditor. The official receiver's fees and expenses had also been paid. All the directors of the respondent company had

consented for the applicant to proceed with the stay application. The official receiver reported that no proof of debt was filed by any other parties. The official receiver is of the view the respondent company is solvent and in view of the fact that the respondent company is able to pay its debt the winding up of the respondent company ought to be stayed.

[19] In respect of the law governing stay application under s. 243(1) of the Companies Act the learned High Court Judge held as follows:

> Under the law, therefore, the granting of a stay of further proceedings of the winding up is a discretionary matter for the court, and the onus is on the applicant to make out a positive case for a stay. In exercising its discretion, the court has to consider certain factors and would act on certain principles which have been established by decided cases. *In Re Warbler Pty Ltd* (1982) 6 ACLR 526, the following principles are enumerated:
>
> (a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co Ltd* (In Liquidation).
>
> (b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this (*Re South Barrule State Quarry Co* (1969) LR 8 Eq 688, *Re Bank of Queensland Ltd* (1870) 2 QSCR 113 referred to).
>
> (c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. (*Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689 at p 694; *Re Dalta Homes Pty Ltd* [1972] 2 NSWLR 22 at p 26 referred to).
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> (d) The attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co Ltd (In Liquidation)* referred to).
>
> (e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. (*Re A Private Company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at p 598 referred to).
>
> (f) If there has been non-compliance by the directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should be given. (*Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174 referred to).
>
> (g) The general background and circumstances which led to the winding up order should be explained. (*Krextile Holdings Pty Ltd v. Widdows* referred to).
>
> (h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to 'commercial morality' or the 'public interest'. (*Krextile Holdings Pty Ltd v. Widdows, Re Dalta Homes Pty* referred to).

In *Re Calgary and Edmonton Land Co Ltd (In Liquidation)*, the court had to decide on an application for stay of the winding up proceedings of the company. The application was dismissed and it was held, *inter alia*:

(1) the court would in normal circumstances, generally exercise its discretion to grant a stay only where the applicant showed: (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or that he consented to the stay or was otherwise bound not to object to it; (b) that the liquidator's position was fully safeguarded, either by paying him the proper amount of his expenses or sufficiently securing payment; and (c) that each member either consented to the stay, or was otherwise bound not to object to it, or there was secured to him the right to reserve all that he would have received if the winding up had proceeded to its conclusion.

[20] When addressing the issue whether the applicant has succeeded in making out a sufficient case for a stay of the winding up order, the learned judge held as follows:

All the directors of the company had given their consent on 22 August 1994, for the applicant to proceed with the application. But no mention is made whether members of the company had consented to the stay or were otherwise bound not to object to it. The affidavit in support of the application is also silent on this issue. The consent of each member to the stay is essential: (*Re Calgary*'s case). The applicant has failed to convince this court that each member of the company has consented or would otherwise be bound not to object. It is not sufficient that the creditors had been paid in full and that the provisional liquidator's fees and expenses have been provided for. This does not in any way reflect the solvency of the company. The payment was made by the applicant who came to the rescue of the company.

The provisional liquidator further says in his report that the company is solvent and recommends that the winding up of company be stayed. I am not convinced that the company is solvent, as the provisional liquidator appears to me to have expressed his opinion that the company is solvent based on the mere fact that the company had paid its two creditors and that the fees and expenses of the provisional liquidator has been provided for and the fact that the company had RM120,000 cash in hand. The report categorically states that the company's only asset as on 13 April 1994 is cash in hand in the sum of RM120,000. No proper account is produced to indicate who is keeping the money. I cannot imagine why such a large sum of money is not kept in the bank, and it is indeed hard to believe that the company has that amount of cash in hand, and yet did not settle its liabilities to the petitioner until after the winding up order of the company was ordered by the court. This state of affairs does not augur well for the company and this prompted me to believe that the company is struggling to settle its debts and it is insolvent, as at the time when the winding up order was made the company had no assets.

[21] Based on the authorities cited above, the applicant has a heavy burden to make a positive or sufficient case. This is so as the effect of a stay pursuant to s. 243(1) of the Companies Act is permanent and far-reaching. In exercising its discretion under s. 243(1) of the Companies Act the court will have to consider the evidence adduced before it. As facts of each case is peculiar, it will depend on the circumstances of each case. The factors to be considered are not exhaustive, therefore it is a question of fact and degree.

[22] The court must not only consider the interest of the liquidator, creditor and contributories of the wound up company but also the interest of the public at large and commercial morality. The fact that the liquidator, creditors and contributories of the wound up company consent to the stay application does not automatically means a stay of the winding up order ought to be granted. This is especially so when the applicant has failed to prove to the satisfaction of court that a stay under s. 243(1) of the Companies Act ought to be granted.

Merits Of The Second Stay Application

[23] The respondent company was incorporated under Companies Act as a private company limited by shares. The registered office of the said company is at 22 June 2007 is at Suite 100A, 6th Floor, Wisma Yakin, Jalan Masjid India, 50100 Kuala Lumpur.

[24] The objects for which the respondent was established are *inter alia*, as follows:

(a) to establish, manage and operate a nursing university, pre-medical, paramedical, post-basic courses subject to the approval of the relevant authorities and for this purpose to set up university, centres, schools, college and other places to conduct same to recruit, engage and employ consultants, lectures and experts to advise and conduct course and other related business of the company and to place advertisements, circulars, brochures, bulletins to the benefit of the company.

(b) to carry on the business of basic and advance nursing training, consultancy on quality and pre-medical, paramedical, post-basic courses and to construct, develop, purchase, lease, rent, provide, maintain, improve, control, manage and operate premises and buildings to house, lectures rooms or examination rooms, laboratories, office or offices, board, lodging and all other necessaries and conveniences for the students, teachers, lecturers, professors, clerks, employees and offices of the company and to afford them facilities for study, research, cultivation, teaching and performance of the tasks and duties allotted to them respectively.

[25] Section 243(1) of the Companies Act provides three categories of persons who can move the court for a stay, namely, liquidator, creditor or contributory of the respondent. In the instant case, based on exh. "MK-2" (a search conducted at Companies Commission of Malaysia on 6 August

2015 in respect of respondent's share capital) of the applicant's affidavit in support of the second stay application, applicant is the majority shareholder of respondent. Going by the definition of 'contributory' under s. 4(1) of the Companies Act, the applicant has *locus* to move the court for an order to stay the winding up order.

[26] According to the applicant the respondent hold a valid license to conduct a nursing course under the name of I-UCAS since 2011. However there is no evidence to support such averment. More importantly no such license issued by the relevant authority to the respondent to conduct a nursing course was adduced before the court. Considering the status of respondent as a wound up entity it is doubtful that the respondent possesses a valid licence as alleged.

[27] The applicant said at the time the second stay application was filed, there are 602 students undergoing training. As such applicant submitted it is imperative for the respondent to be back in operation so as to enable the 602 students to complete their respective courses. According to applicant these 602 students had obtained loan from PTPTN but the loan was not disbursed by PTPTN due to respondent being wound up. The applicant exhibited a list of 602 names who applicant averred as students undergoing the nursing course (exh. "MK-7" encl. 35).

[28] Exhibit "MK-7" encl. 35 is a 14 paged document and the first page bears the words "International University College of Arts And Science" and what appears to be its logo. The said exhibit is a list of 602 names with ID number assigned to each of the names. However there is no evidence to support the applicant's averment that these students are currently studying at I-UCAS. Neither is there any evidence adduced to show the said students had obtained study loan from PTPTN. The averments are merely assertions without any proof.

[29] In this respect the court is inclined to agree with SPA's averment that the applicant does not have knowledge in respect of the 602 students, the operating license that respondent is said to hold, the frozen account of respondent and disbursement of the PTPTN loan. After all, applicant did not file any affidavit to reply to SPA's affidavit opposing the second stay application. Even though SPA changes its stand and supports the said application, that does not prevent the court from considering its affidavit which is before the court.

[30] Based on record, the applicant in the first stay application had also exhibited the same exact list in terms of the names and the number of students said to be undergoing nursing course. There is no explanation as to what happen to the said students after respondent was wound up on 30 April 2014. Since the respondent had been wound up, it is unlikely that the students are still undergoing training at the institution operated and managed by the respondent.

A **[31]** Under the law once a company is wound up the Board of Directors is effectively *functus officio*. The liquidator appointed is vested with the power to run the company including to wind up the company's business, realise the assets, pay off the creditors and return whatever is left over to the members. Section 233(1) of the Companies Act provides where a winding up order has
B been made the liquidator or provisional liquidator shall take into his custody or under his control all property and things in action to which the company is or appears to be entitled.

[32] The official receiver in its report did not provide any information regarding the operational status of the respondent after the winding up order
C and the fate of the 602 students.

[33] According to the applicant it is imperative that the respondent be allowed "… to come back to its operation to ensure that the 602 students complete their respective courses at I-UCAS …" (para. 19 encl. 35). As far as the court is concerned what is imperative and of prime legal concern is
D whether the respondent is in a position to be back in business providing nursing courses. This is because the respondent is, at the moment, in liquidation and insolvent.

[34] In order to be back in operation and to carry out its business there
E must be evidence to demonstrate that the respondent is in a position to do so. In *Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd* [2015] 9 CLJ 640 the learned Judicial Commissioner had this to say:

> (iii) to substantiate a s. 243 application, the applicant must adduce credible evidence that if the s. 243 application is allowed, the wound up company is likely to be commercially solvent and is likely to be
F able to pay its debts when such debts become due and payable in the future. In other words, there must be cogent evidence of the likelihood of the company's commercial solvency or cash flow solvency.
>
> If there is no reliable evidence of the likelihood of the company's
G commercial solvency, the s. 243 application should be dismissed on this ground alone and it does not matter if the total value of the assets of the company exceeds its total liabilities (balance sheet solvency). This is because if such a company is "resurrected", the company may still be commercially insolvent and may incur debts to the prejudice of its creditors, contrary to public interest and
H detrimental to commercial morality.
>
> In support of the above opinion, I rely on the Supreme Court's judgment in *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303. In *Sri Hartamas Dvpt Sdn Bhd*, the Supreme Court applied the "commercial solvency" test or the
I "cash flow solvency" test and not the "balance sheet solvency" test, to ascertain whether the appellant company should be would up on the ground of its inability to pay its debts.

I rely on the "commercial solvency" test or the "cash flow solvency" test as a factor to be considered in a s. 243 application because if a company is wound up based on the "commercial solvency" test, this same test should be satisfied by an application in a s. 243 application to stay the same Winding Up Order (obtained based on the "commercial solvency" test); and

(iv) evidence to show the likelihood of the company's commercial solvency may be given as follows:

(1) evidence of a proposal to inject funds or liquid assets into the company by a "White Knight";

(2) evidence that the company is likely to be given a lucrative contract or transaction which may provide a source of income to the company; and

(3) expert opinion by a qualified and reputable financial consultant or accountant, especially a "companies restructuring specialist", on the likelihood of the company's commercial solvency.

[35] The affidavit supporting the second stay application did not offer any evidence to demonstrate the respondent is likely to be commercially solvent and able to pay its debt when the debt become due and payable in the future. The applicant who is the majority shareholder and contributory of the respondent did not indicate that shareholders or any other interested party will inject funds into the respondent.

[36] Though the debt owed to the petitioner had been paid and the petitioner support the application for stay, that did not overcome the legal threshold imposed on the applicant under s. 243(1) of the Companies Act. Payment of creditors' debt does not necessarily mean the wound up company is solvent. The official receiver's support for the stay application is also not a deciding factor here. The support was solely due to the debt owed to the petitioner has been paid, despite the fact that the fees and expenses incurred by the official receiver has not been paid.

[37] SPA said it has settled with the respondent in respect of the judgment in default it obtained against respondent in Suit 22NCVC-514-09-2015. No evidence was adduced as to the said settlement. The official receiver did not report on the judgment in default obtained against the respondent though the Suit 22NCVC-514-09-2015 was briefly mentioned in his report. The official receiver who is duty bound to deal with the respondent's affairs also did not provide information as to the so called settlement reached between SPA and respondent. It appears that the settlement was made without the knowledge of the official receiver. This may be an irregularity which calls for investigation into the conduct of SPA and respondent.

[38] There was also no report by the official receiver in respect of the consent order dated 11 June 2016 between FP Management and respondent (first defendant), Summugam a/l S Ramasamy (second defendant who is also a director of the respondent company) and Winfield Academy Sdn Bhd (third

A defendant) in the High Court Suit 22NCVC-284-03/2012. Based on the consent order exhibited as exh. "MK-4", it was agreed between the parties that the second defendant is to pay FP Management Consultants Sdn Bhd an amount of RM2 million as full and final settlement of the claim against all the defendants. However applicant said the two defendants (besides the B respondent) has agreed to pay the "compromised sum". It is not made known what is meant by "compromised sum" and there is no evidence to show the RM2 million has been paid so as to absolve the respondent from liabilities under the consent order. It looks like the official receiver who is the provisional liquidator for the respondent is not in the know regarding the C agreement to pay the "compromised sum".

[39] There is no evidence adduced in respect of the current financial status (except that the credit balance of the respondent's estate is RM2,959.90) of the respondent and business plan to revive the respondent company. Importantly the official receiver did not offer any views regarding the D solvency of respondent. The official receiver is not in the position to do so as there was no investigation conducted into the affairs of the company to enable the official receiver to conclude the company is solvent to be back in business or otherwise.

[40] It is obvious the official receiver report (which is required under E s. 243(2) of the Companies Act) is very much lacking in terms of providing information with respect to facts or matters which is relevant to a stay application under s. 243(1) of the Companies Act. The inadequacy of the official receiver's report in the instant case is similar to the provisional liquidator's report (also the official receiver) in *Ting Yuk Kiong v. Mawar Biru* F *Sdn Bhd* (*supra*) where the learned High Court Judge made the following finding:

> It appears to me that the report does not reflect that the provisional liquidator has carried out a proper investigation into the affairs of the company, as he has not stated therein that he has made references to the G company's books or audited accounts or made consultations with the principle officers of the company such as the auditor and the secretary. This, to my mind, he has to do before coming to a conclusion that the company is solvent.

[41] It is however noted that the applicant had exhibited the respondent's financial statement for the year ended 31 December 2013 and 31 December H 2012 (exh. "MK-6" encl. 35). The said financial statements were prepared for the purpose of complying with s. 169 of the Companies Act. Non-compliance of the statutory requirements was one of the reasons for the dismissal of the first stay application. The applicant averred that the financial statement has been sent to the official receiver.

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[42] However there is no evidence to show the said financial statements was lodged with Companies Commission of Malaysia. The affidavit evidence adduced before the court shows as at 6 August 2015 there is no financial

information available in respect of the respondent (see exh. "MK-2" encl. 35). It appears even though the audited financial statements for 2012 and 2013 were dated 20 May 2015 the financial statements were not lodged with the Companies Commission of Malaysia.

[43] In relation to the financial position of respondent, the audited financial statement of respondent for the year 2012 and 2013 does not seem to provide the adequate evidence to demonstrate respondent is likely to be a commercially solvent entity if the second stay application is granted for purpose of resuming the conduct of its business and affairs.

[44] In the independent auditors' report to the Members of RUN Education Sdn Bhd (the respondent) for the year ended 31 December 2012, the independent auditor reported that the respondent "has a deficit in shareholders funds of RM1,694,136 as at 31 December 2012, thereby indicating the existence of a material uncertainty which may cast significant doubt about the company's ability to continue as a going concern". For the year ended 31 December 2013, the deficit in shareholders' funds was reported to be RM2,116,815 and the same concern was expressed by the independent auditor in respect of the respondent's ability to continue as a going concern. In respect of the deficit shareholders' fund for the two consecutive years there is no indication that the shareholders of the respondent had pumped capital into the respondent.

[45] The total issued shares of the respondent are held by the applicant, SPA, Yussaini Othman and Summugam a/l S Ramasamy. According to applicant all the shareholders who are contributories of the respondent consent to the second stay application. Except for SPA, there is no evidence that Yussaini bin Othman and Summugam a/l S Ramasamy had consented to the stay application. It is essential for each member of the wound up company to consent to the stay (see *Ting Yuk Kiong v. Mawar Biru Sdn Bhd* (*supra*). There is also no indication that the shareholders of the respondent are willing to pump capital into the respondent for purpose of demonstrating the respondent's commercial solvency.

[46] Besides the issue relating to deficit of shareholders fund, the cash flow statement for 2013 shows a deficit in net cash from operation compared to the year 2012. It must also be noted that cash and cash equivalent for the two years is decreasing.

[47] The financial statement for 2012 and 2013 is a true and fair view of the financial position of the respondent and of the financial performance and cash flow of the respondent for the two years before it was wound up. As can be seen from the audited financial statement for the relevant two years there was serious concern about the financial position of respondent due to deficit in the shareholders fund and the cash flow. For the year 2014, the audited financial statement for the said year was not exhibited. No attempt was made by the applicant to explain this. Failure to adduce the latest

financial statement compounded with the deficit in shareholders fund and the decreasing cash flow for the year 2012 and 2013 raises real and serious doubts to the likelihood of the respondent to be a commercial solvent entity.

[48] As decided in the cases cited above the winding up court must take into consideration not only the interest of liquidator, creditors and contributory but also the interest of the public and commercial morality. The fact that the respondent is principally engaged in the business of management and operations of a nursing university, pre-medical and courses, requires the court to be vigilant in exercising its discretionary power under s. 243(1) of the Companies Act. This is because the respondent's insolvency will inevitably affect the students, parents, financier and the public at large.

[49] The nursing course provided by respondent to hopeful students is not free. As in other case, the students are required to pay a certain fee in return of being taught and equipped with the necessary knowledge and skill for purpose of securing a certificate or degree which is recognised or accredited by the relevant authority. And as the applicant had stated, the students took study loan to pursue the course provided by the respondent. Since it is a loan, under normal circumstances the students are obliged to pay back to PTPTN. Parents of the students may have stood as guarantor to guarantee the payment of the loan by the students to PTPTN. There is no information as to what happen to the students but in all probability the students are the one adversely affected given the fact that the respondent is now in liquidation. Under this circumstances the court is of the view paramount consideration ought to be given to public interest and commercial morality compared to that of the creditors and contributories of the respondent.

[50] Considering the facts adduced before the court in totality, would it justify the court to exercise its discretion to allow the stay sought by the applicant?. The answer has to be a firm no. The facts (especially the financial position of respondent) clearly point to one conclusion, that is, it would be contrary to public interest and detrimental to commercial morality to accede to the applicant's application to stay the winding up order and allow the respondent to resume the conduct of its business and affairs, in particular to manage and operate a university.

Decision

[51] The legal threshold imposed by s. 243(1) of the Companies Act is a heavy one. The applicant has failed to overcome that threshold as it failed to make a positive or sufficient case to warrant the court to exercise its discretion under the said provision. The appellant has not provided credible evidence to prove to the satisfaction of the court that a stay ought to be granted. In the premise the court dismissed the second stay application (encl. 35) with no order as to costs.